Filed 2/19/09 P. v. Truong CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAMES P. TRUONG, Defendant and Appellant.	B200035 (Los Angeles County Super. Ct. No. KA077535)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Modified, as modified, affirmed.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jason Tran and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

James P. Truong appeals from the judgment entered after a jury convicted him of possessing a sawed-off shotgun and of possessing a controlled substance while armed with a firearm. We hold there was substantial evidence to support the jury's verdicts and that concurrent sentences for the two charges were proper. Because the trial court erred by imposing a lab analysis fee, we modify the judgment to delete that fee, and affirm the judgment as so modified.

FACTS AND PROCEDURAL HISTORY

On the morning of December 10, 2006, Los Angeles County Police Officers Redd and Diaz found James Truong asleep behind the wheel of an illegally parked car that was blocking the driveway of a South El Monte gun club. Concerned for Truong's welfare, the officers made several attempts to wake him by knocking and pounding on the car's windows. When Truong finally awoke, the officers asked if he was all right and also asked him to open the car door. Truong opened the driver's side door and Officer Redd spotted a bag containing a white crystalline substance that she believed was methamphetamine. Officer Diaz searched the car and found a short-barreled shotgun underneath some clothes. The gun was positioned in a spot right alongside the area where Truong had been sleeping in the fully reclined driver's seat. One shotgun shell was in the chamber and three others were loaded in the weapon. Diaz then found a glass smoking pipe beneath the driver's seat. In the trunk was a half-gallon jar containing a dark crystalline substance that later testing identified as a mixture of iodine and red phosphorous, which are commonly used to make hydriodic acid as part of the methamphetamine manufacturing process.

Truong was charged with three counts: (1) possession of chemicals sufficient to make hydriodic acid with the intent to make methamphetamine (Health & Saf. Code, § 11383, subd. (g)); (2) possession of a sawed-off shotgun in violation of the concealed weapons law (Pen. Code, § 12020, subd. (a)(1)); and (3) possession of a controlled substance while armed with a loaded, operable firearm (Health & Saf. Code, § 11370.1, subd. (a)).

At trial, Officer Diaz described the shotgun found by Truong's side as "sawed-off." Redd testified that the shotgun barrel was 11 inches long, which was below the legal limit. Instead of being smooth as it should be, the barrel's edge was rough. Redd testified that she watched as another officer determined the shotgun was working by opening the gun barrel and pulling the trigger to see if the firing pin would strike his finger. When that officer pulled the trigger, the firing pin was activated, showing that the trigger mechanism was in working order. Testing of the white substance found in the bag by the driver's door showed it was 1.71 grams of methamphetamine. An expert witness testified that the pipe found under the driver's seat was of a type commonly used to smoke methamphetamine, and the pipe bore burn and residue marks that confirmed it had been used for that purpose. The same expert testified that methamphetamine users will often carry firearms for self-defense because the drug makes them paranoid.

The jury deadlocked on the first count, a mistrial was declared on that count and it was dismissed. The jury convicted Truong of the other two counts. The court imposed a four-year sentence on the count for being armed while possessing drugs and a concurrent two-year term for the sawed-off shotgun count. On appeal, Truong contends: (1) there was insufficient evidence he knew the shotgun was unlawfully short; (2) there was insufficient evidence that the shotgun was both operable and loaded with live ammunition under Health & Safety Code section 11370.1; (3) his concurrent sentence for being armed with a firearm while possessing drugs should have been stayed instead under Penal Code section 654; and (4) the trial court erred by imposing a lab analysis fee of $50 under Health and Safety Code section 11372.5, subdivision (a).

DISCUSSION

1. There Was Sufficient Evidence Truong Knew of the Shotgun's Unlawful Characteristics

Under the concealed weapon law (Pen. Code, § 12020, subds. (a)(1) & (c)(1)(A)), the prosecution had to show that Truong possessed a shotgun with a barrel less than 18 inches long. It also had to show he actually knew the barrel was unusually short,

although it did not have to show Truong knew the actual length. (*People v. King* (2006) 38 Cal.4th 617, 627 (*King*).) Truong contends there was insufficient evidence he knew the barrel was too short, especially because there was no evidence that: he owned the car he was found in or how he got in the car; he had handled the shotgun; he shortened its barrel; or he had ever handled the weapon.

We review his claim under the well-established rules for determining the existence of substantial evidence to support a jury's findings: We view the evidence in the light most favorable to the verdict, resolving all evidentiary conflicts and indulging all presumptions to affirm. The proper test is whether a rational trier of fact could find a defendant guilty beyond a reasonable doubt. Circumstantial evidence is sufficient for this purpose. (*King, supra*, 38 Cal.4th at p. 627.)

Someone who possesses a rifle with an unlawfully short barrel, having actually observed the weapon, "necessarily knows of its shortness, and thus knows its illegal characteristic, whether or not the person knows how many inches long the weapon is." (*King, supra,* 38 Cal.4th at pp. 627-628.) Truong was found asleep in a car with methamphetamine in a bag to one side of his sleeping body and the clothing-covered shotgun to the other. The shotgun was not just shy of the legal length of 18 inches. Instead, it was seven inches shorter, a difference of more than one-third.[1] The barrel's edge was also rough, not smooth. This would have been readily obvious to anyone who saw the shotgun. As one drug expert testified, methamphetamine users often keep firearms handy to protect themselves and the jury could readily infer from this testimony that Truong had done just that. Of course, if he kept the weapon for that purpose, especially one that was loaded, it is reasonable to conclude he handled and had therefore seen the weapon. Combined with the fact that the weapon was concealed under clothing, the jury could rationally conclude that Truong had not just seen and handled the weapon, but was trying to keep it out of sight because it was an illegal weapon.

---

[1] Accordingly, there is no dispute that the shotgun found by Truong was unlawfully short.

Relying on *U. S. v. Nevils* (9th Cir. 2008) 548 F.3d 802 (*Nevils*), Truong contends there was insufficient evidence he either possessed the shotgun or knew of its unlawful characteristics. The defendant in *Nevils* was convicted of violating a federal law that prohibited felons from possessing firearms. He was found asleep in an apartment with one gun on his lap and another leaning against his leg. On a coffee table in front of him were drugs, money, cell phones, and watches. The Ninth Circuit held this evidence was insufficient to show Nevils was aware of the weapons' presence for purposes of showing knowing possession. (*Id.* at pp. 808-810.) Even if we were to accept the reasoning of the *Nevils* court,[2] it is readily distinguishable.

The *Nevils* majority relied heavily on the following facts: the apartment was not Nevils's; the door was open and off its hinges; there was evidence that many persons had access to the apartment, which was known for drug activity; there was evidence that Nevils had passed out somewhere else and been brought to the apartment, and was left there at a time when the guns and drugs were not present. By contrast, Truong was found inside a car with methamphetamine on one side and a sawed off shotgun on the other. He was convicted of possessing those drugs, and does not contest that finding on appeal. Because he concededly possessed the methamphetamine, it is equally inferable that he exercised possession over other items inside the car, including the shotgun. There was no evidence that anyone else had access to the car or had placed the shotgun inside the car without Truong's knowledge while he slept. We therefore affirm the jury's verdict.

2. *There Was Sufficient Evidence That the Shotgun Was Operable and Loaded With Live Ammunition*

In order to convict Truong under Health and Safety Code, section 11370.1 (section 11370.1), the prosecution had to show that Truong possessed methamphetamine and was armed with a loaded, operable firearm at that time. (§ 11370.1, subd. (a).) Truong contends there was insufficient evidence the shotgun in his possession was operable. He

---

[2] Justice Bybee authored a stinging dissent to the majority opinion.

also contends that even though the weapon was loaded with four shells, there was no evidence the ammunition was live.

Officer Redd testified she watched as another officer pulled the trigger and successfully engaged the firing pin, thereby demonstrating that the weapon was functional. Truong contends this was insufficient to establish the gun was operable because Redd was not a firearms expert and because the gun was never actually test fired. We disagree. For the proposition that test firing was required, Truong cites decisions concerning proof that a minor violated Penal Code section 12021, subdivision (b)(1) by possessing live ammunition. They are therefore inapplicable. As for the requirement of expert testimony, we first note that no objection was made on that ground when Redd testified, meaning the issue was waived. (*People v. Lewis* (2008) 43 Cal.4th 415, 503.) Alternatively, we conclude a police officer, who routinely handles firearms, may testify that a particular weapon is operable.

As for the requirement of live ammunition, Truong again relies on decisions concerning the statute that prohibits minors from carrying live ammunition, and notes that no witness testified that the four shells loaded in the sawed-off shotgun were live. Section 11370.1 does not mention live ammunition, but does require that the weapon be loaded. Respondent does not address this issue, but we will assume for discussion's sake only that the shotgun shells loaded in the weapon had to be live. Even so, there was sufficient evidence for the jury to conclude the shells were live.

One of the "minors with live ammunition" decisions cited by Truong was *In re Khamphouy S.* (1993) 12 Cal.App.4th 1130, where, despite the absence of direct evidence that the bullets found in the minor's weapons were live, the appellate court held there was sufficient evidence to support that finding. This included the trial court's statement that the bullets looked live, the multiple rounds found in the minor's pocket and other weapons, the arresting officer's testimony that the guns were loaded, and the officer's conduct in quickly unloading the weapons when he found them. (*Id.* at pp. 1134-1135.) Similar factors are present here. The shotgun contained multiple rounds and Officer Redd described the gun as having been loaded. Her partner, Officer Diaz, identified the

four shells at trial as "Fiocchi dove load." Implicit in this description is the officer's observation that the shells were the product of a specific manufacturer and were packed with a specific load of shot that had not been expended. Based on all this, we hold the jury could reasonably conclude the shells were live.[3]

3. *Concurrent Sentences Did Not Violate Penal Code Section 654*

Penal Code section 654 precludes multiple punishments for a single act or a course of conduct comprising indivisible acts. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).) Truong contends that concurrent sentences for his crimes – possessing a sawed-off shotgun and being armed with a gun while possessing drugs – were improper under Penal Code section 654 and that the lesser sentence for the sawed-off shotgun should have been stayed instead.

Whether a course of conduct is divisible or not depends on the defendant's intent and objective. If all the offenses were merely incidental to or were the means of accomplishing one objective, then a single intent existed and the defendant may be punished only once. (*Jones, supra,* 103 Cal.App.4th at p. 1143.) If the defendant had multiple or simultaneous objectives, independent of and not just incidental to each other, then he may be punished for each crime committed in pursuit of each objective. This is so even if the crimes shared common acts or were part of an otherwise indivisible course of conduct. (*Ibid.*) This presents a question of fact for the trial court, which has broad

---

[3] We also note, but do not rely upon, the fact that the trial court here initially declined to let the jury examine the shotgun or the shells while deliberating, but changed its mind so long as the bailiff held onto those items and kept them separate from each other. Therefore, similar to *Khamphouy S., supra,* 12 Cal.App.4th at pages 1134-1135, the judge apparently believed the evidence showed the shells were live.

latitude in making its determination. We will affirm the trial court's finding so long as it is supported by substantial evidence. (*Ibid.*)[4]

The *Jones* court held that Penal Code section 654 did not apply to the sentencing of a defendant convicted of shooting at an inhabited dwelling (Pen. Code, § 246) and being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)) because the defendant must have possessed the firearm before he ever drove to the victim's house and fired into it. (*Jones, supra,* 103 Cal.App.4th at pp. 1144, 1147.) We believe this reasoning applies here.

As noted, there was expert testimony that methamphetamine users often arm themselves for self-defense out of drug-fueled paranoia. Based on this, it is reasonable to infer that Truong did not take possession of the sawed-off shotgun at the same time he took possession of the drugs that were found with him. Instead, he most likely had it before then, and intended to hold onto it for his personal safety long after he used up his methamphetamine. Accordingly, there is sufficient evidence to support an implied finding of separate intents or objectives, making Penal Code section 654 inapplicable.

Furthermore, the two crimes have separate statutory requirements and objectives. Penal Code section 12020 is designed to outlaw instruments commonly used by criminals for unlawful purposes. (*People v. Mayberry* (2008) 160 Cal.App.4th 165, 170.) By its terms, it does not require proof that the weapon was loaded or operable. (See *People v. Favarola* (1974) 42 Cal.App.3d 988, 991, 994 [operability not required].) By contrast, section 11370.1 was intended to protect the public and the police from the serious public safety threat posed by armed drug users. (*In re Ogea* (2004) 121 Cal.App.4th 974, 984.) Because these two statutes have different requirements and statutory objectives, it was proper to punish Truong for having violated both. (*People v. Harrison* (1969) 1 Cal.App.3d 115, 122 [defendant found with handgun in car he was driving was properly punished for violations of both Penal Code section 12021 for being a felon in

---

4 The trial court expressly said it believed concurrent sentences were proper, but did not specify why. The substantial evidence rule applies to its implied findings to support that decision. (*Jones, supra,* 103 Cal.App.4th at p. 1147.)

possession of a firearm and Penal Code section 12031, subdivision (a), which prohibited carrying a loaded, concealed weapon in a motor vehicle].)

4. *The Lab Analysis Fee Must Be Stricken*

The trial court imposed a $50 crime lab analysis fee pursuant to Health & Safety Code section 11372.5, subdivision (a). Truong contends and respondent concedes that this was error, because the two crimes he was convicted of are not listed as qualifying offenses under that statute. We will therefore order that fee stricken from the abstract of judgment.

DISPOSITION

For the reasons set forth above, the abstract of judgment is modified to delete the Health and Safety Code section 11372.5 lab analysis fee. The clerk of the superior court is directed to prepare a corrected abstract of judgment and forward a copy to the Department of Corrections. The judgment as modified is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN ,J. ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.